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NO. _____

94-7427

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

OCTOBER TERM, 1994

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Joseph V. Libretti, Jr., by and through his court appointed counsel, Jenine Jensen, Assistant Federal Public Defender, respectfully requests this Honorable Court for leave to proceed in forma pauperis in applying for a Writ of Certiorari. As grounds therefore he states that undersigned counsel was appointed pursuant to the Criminal Justice Act, was appointed by the United States Court of Appeals for the Tenth Circuit, and he is unable to retain counsel and pay for costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the Petitioner respectfully requests that he be granted leave to proceed in forma pauperis.

Respectfully submitted,

JENINE JENSEN
Attorney at Law
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Denver, Colorado 80202
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Supreme Court, U.S.
FILED
DEC 27 1994
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender

JENINE JENSEN
Assistant Federal Public Defender
1099 18th Street, Plaza Tower, #300
Denver, Colorado 80202
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QUESTIONS PRESENTED

I. WHETHER THE TENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A SENTENCING JUDGE IS NOT REQUIRED UNDER FED. R. CRIM. P. RULE 11(f) TO DETERMINE WHETHER THERE IS A FACTUAL BASIS FOR A DEFENDANT'S AGREEMENT TO A CRIMINAL FORFEITURE UNDER 21 U.S.C. § 853, ENTERED PURSUANT TO A PLEA AGREEMENT.

II. WHETHER THE TENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A DEFENDANT NEED NOT SPECIFICALLY WAIVE HIS RIGHT TO A JURY TRIAL ON FORFEITURE ISSUES.

List of Parties Below

1. United States of America
2. Joseph V. Libretti, Jr.

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PRAYER

The petitioner, Joseph V. Libretti, Jr., respectfully prays that a writ of certiorari be issued to review the order and judgment of the United States Court of Appeals for the Tenth Circuit issued on October 19, 1994.

OPINION BELOW

A copy of the order and judgment issued by the United States Court of Appeals for the Tenth Circuit in the case of United States v. Libretti, 38 F.3d 523 (10th Cir. 1994) is attached as Appendix A.

JURISDICTION

On October 19, 1994, the United States Court of Appeals for the Tenth Circuit entered its order and judgment affirming the judgment of the United States District Court for the District of Wyoming. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

21 U.S.C. § 853(a) provides:

> Any person convicted of a violation of this subchapter . . . punishable by imprisonment for more than one year shall forfeit in the United States, . . .
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of [CCE] . . . , the person shall [also] forfeit . . . any of his interest in, claims against, and property or contractual rights affording a source of control over, the [CCE].

Fed. R. Crim. P. Rule 11(f) states that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

STATEMENT OF THE CASE

In this case, the Tenth Circuit decided two issues of first impression that have resulted in splits among the circuits, and that have not been addressed by this Court.

Mr. Libretti pled guilty to one count of continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848. He was sentenced to 20 years imprisonment and a fine. In addition, the district court entered a criminal forfeiture order pursuant to 21 U.S.C. § 853(a).

Petitioner's plea agreement provided that he would agree to criminal forfeiture of his assets under § 853. It stated:

> 10. The Defendant agrees to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts,

cash, cashier's checks, travelers checks and funds of any kind.

At the change of plea hearing, the judge explained to the petitioner that the forfeiture applied to "the property that is owned by you by reason of any drug transaction." The judge then advised:

> And then under the topic Forfeiture, [the indictment] alleges that upon conviction of the defendant for engaging in a continuing criminal enterprise, the United States is entitled to forfeiture of all property of any kind constituting or derived from proceeds Libretti obtained directly and indirectly by engaging in said continuing criminal enterprise; all property of any kind which was used or intended for use in any manner or part to commit or to facilitate the commission of this criminal -- continuing criminal enterprise, including but not limited to the following, and then there is listed real property, your lot in Star Valley [Wyoming], conveyances of two vehicles, cash proceeds over a hundred thousand dollars and then another $12,000 and a five -- 5,100 and 7,600 amount in currency and jewelry and property consisting of a mobile home and a computer system, bank accounts that are listed in the Indictment, investments that are listed in the Indictment, and additional cashier's checks and the contents of safe deposit boxes, and that's it.

The petitioner was not advised of, and did not waive, his right to a jury trial on the issue of which assets were actually subject to forfeiture. Likewise, the judge made no findings of any factual basis for the forfeiture plea.

At sentencing, the judge granted the forfeiture order. Petitioner's counsel did not object. The petitioner did, saying "I would just like to object to what I see as a failure to find any

factual basis for the whole forfeiture, just for the record." The judge overruled his objection.

Petitioner filed a notice of appeal from the forfeiture order. He filed a pro se Opening Brief and undersigned counsel was appointed to file a Supplemental Opening Brief. The key issues raised on appeal were (1) whether the district court erred by ordering forfeiture of nonforfeitable property and failing to make findings of a factual basis for forfeiture; and (2) whether petitioner was entitled to be advised, as part of entering his guilty plea, that he had the right to a jury trial on the forfeiture issue (apart from any trial on the drug offense itself).

In its decision, the Tenth Circuit noted: "Whether Rule 11(f) applies to a stipulated forfeiture in a plea agreement is an issue of first impression in this circuit." United States v. Libretti, 38 F.3d 523, 537 (10th Cir. 1994). The court also noted the "divergent conclusions" reached by four other Circuits. Id. at 528.

The Seventh Circuit has held that Rule 11(f) applies to forfeitures that are included as part of the plea agreement. United States v. Roberts, 749 F.2d 404 (7th Cir. 1984), cert. denied, 470 U.S. 1058 (1985).

The Fourth Circuit has held that a defendant's agreement to forfeit an item in the plea agreement does not, without more, make the item forfeitable. United States v. Reckmeyer, 786 F.2d 1216, 1222 (4th Cir.), cert. denied, 479 U.S. 850 (1986) (Rule 11(f) requires the district court to inquire beyond the plea agreement to

determine if there is a factual basis for forfeiture of the assets).

The Fifth Circuit has held that the Rule 11(f) requirement of a factual basis for the plea does not apply to a forfeiture order. United States v. Bachynsky, 949 F.2d 722, 730 (5th Cir. 1991), cert. denied, 113 S. Ct. 150 (1992) (defendant has the burden to establish an inadequate factual basis for a forfeiture order, in the absence of a timely objection).

The Eleventh Circuit has squarely held to the contrary. That Circuit has held that because an agreement to plead to forfeiture is not an agreement to "plea to a substantive charge," Rule 11(f) does not apply. United States v. Boatner, 966 F.2d 1575, 1581 (11th Cir. 1992).

In Libretti, the Tenth Circuit adopted the Eleventh Circuit's Boatner reasoning. 38 F.3d at 528. Applying that analysis, the court held that the district court properly ordered forfeiture of all defendant's assets, regardless of whether they had any connection with his drug dealings in general or the CCE conviction in particular, "based on defendant's written agreement and knowing and voluntary ratification of that agreement at the change of plea hearing." Libretti, 38 F.3d at 530.

The second issue on appeal arose from petitioner's right to a jury trial on the forfeiture issues. The Court again faced another "apparent[] split [in the circuits] on the issue of a constitutional right to a jury trial on forfeiture." Libretti, 38 F.3d at 530. Compare United States v. Garrett, 727 F.2d 1003, 1012

& n.6 (11th Cir. 1984) (defendant has a constitutional right to a jury trial in a 21 U.S.C. § 848 proceeding to determine if an asset is forfeitable), aff'd on other grounds, 471 U.S. 773 (1985) with United States v. Robinson, 8 F.3d 418, 420 (7th Cir. 1993) (defendant may not have a constitutional right to jury trial on forfeiture issues, but does have the statutory right to a jury determination under Fed. R. Crim. P. 31(e)). Rather than address the constitutional issue, the Circuit agreed that the petitioner had a statutory right to a jury trial, but concluded that he had knowingly and voluntarily waived it. Libretti, 38 F.3d at 530. See Robinson, 8 F.3d at 421 (constitutional waiver principles applied to analyze whether defendant waived his statutory right to a jury trial).

Neither the in-court advisement nor the plea agreement in this case informed the petitioner that he had a statutory or constitutional right to a jury trial. Libretti, 38 F.3d at 531. Thus, the petitioner was never aware of any right to a jury trial on the forfeiture. "The right to a jury trial is personal to a defendant and one which he alone may waive." Robinson, 8 F.3d at 423 (internal quotations omitted). Despite this, the Circuit held that "specific reference to a jury trial on forfeiture issues was not necessary in light of the unambiguous plea agreement and defendant's knowing and voluntary plea." Libretti, 38 F.3d at 531. This conclusion is wrong, because a defendant cannot knowingly and voluntarily waive a right of which he has not been advised.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1.(a, c) states that certiorari review may be appropriate when "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter," and when a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court.

This case fits within both parameters. The forfeiture/Rule 11(f) question had already created a split in the federal circuits. After the Tenth Circuit decision adopting the minority view, the split is 3-2. In addition, this is an important issue not yet addressed by the Supreme Court.

The same analysis applies to the second issue (right to jury trial), where the split in the federal circuits is now 2-1.

CONCLUSION

For these reasons, the petitioner respectfully requests that this Court issue a petition for writ of certiorari.

Respectfully submitted,

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United States, 273 F.2d 462, 466 (10th Cir. 1959), *cert. denied*, 363 U.S. 846, 80 S.Ct. 1619, 4 L.Ed.2d 1729 (1960). "[An indictment] is not evidence that the offense charged was committed." *United States v. Glaziou*, 402 F.2d 8, 15 (2nd Cir.1968), *cert. denied*, 393 U.S. 1121, 89 S.Ct. 999, 22 L.Ed.2d 126 (1969). Because the government offered no other evidence of racketeering activity, we find that the government did not show by a preponderance of the evidence that defendant violated section 1961. Accordingly, defendant's sentence cannot be increased under section 2T1.2(b)(1).

Having decided that section 2T1.2(b)(1) does not apply, the question of defendant's appropriate original base level is no longer moot. Whether defendant's base level should be six or eight is a factual determination that the district court must resolve. We therefore remand the case for resentencing in accordance with this opinion.

III. CONCLUSION

The decision of the trial court is **REVERSED** and defendant is **REMANDED** for resentencing.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph V. LIBRETTI, Jr.,
Defendant-Appellant.

No. 93-8000.

United States Court of Appeals,
Tenth Circuit.

Oct. 19, 1994.

Following guilty plea in which he agreed to forfeiture of assets, defendant was convicted in the United States District Court for the District of Wyoming, Clarence A. Brimmer, Jr., J., of continuing criminal enterprise. Following defendant's appeal of order of forfeiture of all his property, the district court granted defendant's motion to stay forfeiture and amended forfeiture order to delete certain property owned by third parties. The Court of Appeals, Logan, Circuit Judge, held that: (1) appeal from order of forfeiture was not moot; (2) Court of Appeals had jurisdiction to consider appeal notwithstanding fact that district court had granted motion for stay and amended forfeiture order; (3) sentencing judge was not required to determine whether there was factual basis for defendant's concession to criminal forfeiture pursuant to plea bargain; (4) defendant's agreement to guilty plea in which he agreed to forfeiture of all property was knowing and voluntary; (5) defendant was bound by terms of unambiguous plea agreement forfeiting all his property; (6) defendant's waiver of right to jury trial to determine which property was subject to forfeiture was valid; and (7) forfeiture was not excessive fine and was constitutional.

Order of forfeiture affirmed, government's motion to dismiss denied, and defendant's motion for limited remand denied as moot.

1. Forfeitures ⇐5

Appeal from order of forfeiture was not moot where issues raised by appeal were still "live" and defendant had interest in outcome of appeal, notwithstanding facts that defendant pleaded guilty to charge and consented to forfeiture of his assets.

2. Criminal Law ⇐990.1, 1023(11)
Forfeitures ⇐5

Sentencing decision is final decision for purposes of appeal, and order of criminal forfeiture is part of sentencing decision. 28 U.S.C.A. § 1291.

3. Criminal Law ⇐1023(11)

If defendant timely moves to correct sentence, motion renders otherwise final order nonfinal until district court disposes of motion. Fed.Rules Cr.Proc.Rule 35(c), 18 U.S.C.A.

4. Forfeitures ⇐5

Requested modification of forfeiture order was beyond scope of relief available on motion to correct sentence where request to amend order of forfeiture was not made within permissible time period and was therefore not timely motion to correct sentence. Fed. Rules Cr.Proc.Rule 35(c), 18 U.S.C.A.

5. Forfeitures ⇐10

Although district court has jurisdiction to consider third-party claims to property which has been ordered forfeited as part of criminal sentence, after notice of appeal is filed district court lacks jurisdiction to consider defendant's claims to forfeited property. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413(n), as amended, 21 U.S.C.A. § 853(n).

6. Forfeitures ⇐5

Court of appeals had jurisdiction to consider appeal by defendant of order of criminal forfeiture notwithstanding fact that district court, after entry of order of forfeiture and filing of notice of appeal by defendant, had granted defendant's motion for stay of forfeiture and amended forfeiture order to delete certain property owned by third parties. 28 U.S.C.A. § 1291.

7. Forfeitures ⇐2

Cases applying Racketeer Influenced and Corrupt Organizations (RICO) forfeiture statute may be used to construe criminal forfeiture statute due to similarity of two statutes. 18 U.S.C.A. § 1963; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413, as amended, 21 U.S.C.A. § 853.

8. Criminal Law ⇐273(4.1)

Sentencing judge is not required to determine whether there is factual basis for defendant's concession to criminal forfeiture made pursuant to plea bargain with government. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413, as amended, 21 U.S.C.A. § 853; Fed.Rules Cr. Proc.Rule 11(f), 18 U.S.C.A.

9. Criminal Law ⇐273.1(2)

Lawful plea agreement is enforceable, and as long as agreement as lawful, defendant should be bound by its terms.

10. Criminal Law ⇐1139

Voluntariness of guilty plea is question of federal law subject to de novo review.

11. Criminal Law ⇐273.1(1)

Guilty plea must be knowing and voluntary, and defendant's decision to plead guilty must be deliberate and intelligent and chosen from available alternatives.

12. Criminal Law ⇐273.1(4)

District court is required to ensure that defendant who enters guilty plea understands nature of charge and mandatory minimum and maximum penalties.

13. Criminal Law ⇐273.1(2, 4)

Guilty plea in which defendant agreed to forfeiture of all property owned by reason of any drug transaction was voluntarily given and enforceable where defendant stated that he had signed, read, and understood plea agreement and had no questions and that he understood consequences of his plea including that all of his property owned by reason of any drug transaction could be forfeited, nothing in record indicated that defendant's plea would have been different if he had been questioned further about forfeitability of his assets, and defendant received favorable plea agreement.

14. Criminal Law ⇐273.1(2)

Defendant was bound by terms of plea agreement in which he unambiguously forfeited all of his property, notwithstanding extraneous statements by district court that defendant was only forfeiting assets listed in continuing criminal enterprise count of indictment or from his drug trade. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413, as amended, 21 U.S.C.A. § 853.

15. Jury ⇐19(15)

Defendant has statutory right to have jury determine which of his assets may be forfeited. Fed.Rules Cr.Proc.Rule 31(e), 18 U.S.C.A.

16. Jury ⇐29(6)

Defendant has burden of proving that waiver of right to have jury determine which portion of his property was subject to forfeiture was not valid. Fed.Rules Cr.Proc.Rule 31(e), 18 U.S.C.A.

17. Jury ⇐29(6)

Valid waiver of jury trial depends on unique facts of each case.

18. Jury ⇐29(6)

Specific waiver of defendant's right to jury trial to determine which portion of his property was subject to forfeiture was not necessary, and unambiguous plea agreement and knowing and voluntary plea of guilty to charges was sufficient to waive right to jury trial, where district court told defendant that by pleading guilty he gave up right to jury trial, defendant stated that he understood rights and chose to plead guilty, and there was no evidence that defendant wanted jury trial on forfeiture issue or thought he was going to have one, notwithstanding facts that district court did not specifically indicate that plea agreement negated jury trial on forfeiture issues and plea agreement did not mention forfeiture in waiving jury trial. Fed. Rules Cr.Proc.Rule 31(e), 18 U.S.C.A.

19. Criminal Law ⇐1214

Courts must consider all factors when evaluating whether forfeiture is an unconstitutionally excessive fine. U.S.C.A. Const. Amend. 8.

20. Criminal Law ⇐1214
Forfeitures ⇐3

Forfeiture of property was not an unconstitutionally excessive fine where plea agreement stated that property up to $1,500,000 could be forfeited, actual value of property forfeited was $410,000, defendant was fined $5,000, and maximum penalty for offense to which defendant pled guilty was fine of up to $2,000,000 and forfeiture. U.S.C.A. Const. Amend. 8; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(a), as amended, 21 U.S.C.A. § 848(a).

David D. Freudenthal, U.S. Atty., David A. Kubichek, Asst. U.S. Atty., D. Wyo., Casper, WY, for plaintiff-appellee.

Michael G. Katz, Federal Public Defender, Jenine Jensen, Asst. Federal Public Defender, Denver, CO, for defendant-appellant.

Defendant-appellant Joseph V. Libretti, Jr. also filed pro se briefs.

Before LOGAN and BARRETT, Circuit Judges, and RUSSELL,* District Judge.

LOGAN, Circuit Judge.

Defendant Joseph V. Libretti, Jr. appeals from an order of criminal forfeiture. He contends that (1) the district court erred in not making factual findings as to the forfeitability of assets; (2) he was not advised of and did not waive his right to a jury trial on the forfeiture issues; and (3) even if his assets were properly forfeited, the forfeiture order violated the Excessive Fines Clause of the Eighth Amendment. We exercise jurisdiction under 18 U.S.C. § 3742(a) and affirm the order of forfeiture.[1]

A grand jury returned a superseding indictment against defendant containing eleven counts of various drug, firearms, and money laundering violations, including continuing criminal enterprise (CCE), 21 U.S.C. § 848. After one week of trial, defendant entered into a plea agreement. Pursuant to that agreement, he pleaded guilty to the CCE count and to forfeiture of "all known assets as prescribed in 21 U.S.C. § 853 and assets which are discovered at any later time up to $1,500,000." I R. tab 210 at 2. The plea agreement further provided that defendant would forfeit

> his right, title, and interest in all of his assets ... including, but not limited to: all real estate; all personal property, including guns, the computer, and every other

* Honorable David L. Russell, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers checks and funds of any kind.

Id. at 3. In exchange for defendant's plea agreement the government agreed to recommend the minimum sentence applicable to a CCE conviction, twenty years imprisonment, and not to pursue other criminal charges against him.

At the change of plea hearing, the district court questioned defendant regarding the voluntariness of his guilty plea. The district court also advised defendant about the forfeiture:

> And then under the topic Forfeiture, it alleges that upon conviction of the defendant for engaging in a continuing criminal enterprise, the United States is entitled to forfeiture of all property of any kind constituting or derived from proceeds [defendant] obtained directly and indirectly by engaging in said continuing criminal enterprise; all property of any kind which was used or intended for use in any manner or part to commit or to facilitate the commission of this criminal—continuing criminal enterprise, including but not limited to the following, and then there is listed real property, your lot in Star Valley, conveyances of two vehicles, cash proceeds over a hundred thousand dollars and then another $12,000 and a five—5,100 and 7,600 amount in currency and jewelry and property consisting of a mobile home and a computer system, bank accounts that are listed in the Indictment, investments that are listed in the Indictment, the additional cashier's checks and the contents of safe deposit boxes, and that's it.

II R. 18–19. The district court further stated that the forfeiture applied to all property owned by defendant "by reason of any drug transaction." *Id.* at 21. Defendant admitted that he understood the indictment and plea agreement including the provisions concerning forfeiture. *Id.* at 19–21. The district court approved the plea agreement after determining the guilty plea was voluntary and factual.

The district court later sentenced defendant to twenty years imprisonment, five years supervised release, a $5,000 fine, a $50 special assessment, and 500 hours of community service.[2] The district court also granted forfeiture pursuant to the plea agreement. At the conclusion of the sentencing hearing, defendant objected to the failure of the district court to find a factual basis for the whole forfeiture. XIII R. 25 (record in appeal No. 93–8001). The district court noted the objection, but determined that there was sufficient evidence to warrant granting forfeiture. On December 23, 1992, the district court entered an order of forfeiture pursuant to 21 U.S.C. § 853. The order stated that defendant "agreed to forfeit all property," I R. tab 259 at 1, and then specifically listed property to be forfeited. Defendant appealed from the order of forfeiture.

Subsequently, the district court held a hearing on defendant's motions for stay and to amend the forfeiture order and on third party claims to the forfeited property, all made on or after January 19, 1993. On February 12, 1993, the district court determined that ownership of certain items of forfeited property was in dispute and that because it was willing to consider defendant's motion to amend, the December 23, 1992 order was not final. The district court stated that defendant's appeal was premature and then scheduled a hearing to consider ownership of the disputed property.

After the hearing the district court amended the forfeiture order to delete certain property owned by third parties. The district court also ordered the magistrate judge to conduct fact finding hearings to address additional third party interests in certain property listed in the forfeiture order to consider whether it was in fact forfeitable. The government filed motions for reconsideration and to stay proceedings before the magistrate judge pending appeal. V R. tabs 353, 374 (record in appeal No. 93–8001). The district court granted the motion for stay.

I

[1–4] We first consider whether the district court's actions after the notice of appeal was filed deprives us of jurisdiction.[3] We have jurisdiction to consider a final decision of the district court. 28 U.S.C. § 1291. A sentencing decision is a final decision, *see Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S.Ct. 1494, 1497–98, 103 L.Ed.2d 879 (1989); *United States v. Snell*, 922 F.2d 588, 590 (10th Cir.1990), and, as defendant concedes, a forfeiture is part of the criminal sentence. *United States v. Elgersma*, 971 F.2d 690, 694 (11th Cir.1992) (21 U.S.C. § 853(a) makes clear that forfeiture is part of punishment); *United States v. Hernandez–Escarsega*, 886 F.2d 1560, 1577 (9th Cir.1989) (same), *cert. denied*, 497 U.S. 1003, 110 S.Ct. 3237, 111 L.Ed.2d 748 (1990); *United States v. Sandini*, 816 F.2d 869, 875 (3d Cir.1987) (same); *see United States v. Songer*, 842 F.2d 240, 241 (10th Cir.1988) (forfeiture treated as part of sentence).[4]

[5, 6] Although the district court has jurisdiction to consider third party claims to property, *see* 21 U.S.C. § 853(n) (providing means for third parties to obtain their property which has been forfeited), after a notice of appeal is filed, the district court lacks jurisdiction to consider a defendant's claims. *See Berman v. United States*, 302 U.S. 211, 214, 58 S.Ct. 164, 166, 82 L.Ed. 204 (1937). Thus, any subsequent actions by the district court do not defeat our jurisdiction.

II

Defendant argues that the district court erred in ordering forfeiture of the nonforfeitable property in light of his objection at the sentencing and the court's own post-judgment rulings. He alleges that factual findings must be made establishing that the assets to be forfeited are part of a continuing series of offenses. Defendant maintains that the trial testimony and change of plea and sentencing hearings show that there was not a sufficient nexus to support a forfeiture of accounts containing legitimate earnings such as his employee savings plan, IRA accounts, and bank accounts containing his paychecks.

Federal Rule of Criminal Procedure 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."[5] The government contends that Rule 11(f) applies only to the guilty plea and imposes no duty on the district court to ensure a sufficient factual basis exists to support the stipulated forfeiture in the plea agreement. Whether Rule 11(f) applies to a stipulated forfeiture in a plea agreement is an issue of first impression in this circuit. Four circuits have con-

2. Defendant appeals the imposition of the fine and the requirement of community service in appeal No. 93–8001, also decided and affirmed today.

3. The government has also filed a motion to dismiss this appeal as moot. The government contends that because defendant pleaded guilty to CCE and consented to forfeit his assets he lacks a legally cognizable interest in the outcome of the appeal. "In general a case becomes moot '"when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."'" *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208–09, 63 L.Ed.2d 479 (1980), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950–51, 23 L.Ed.2d 491 (1969)). Because defendant has appealed the order of forfeiture, as is discussed hereafter, the issues in this case are still "live," and defendant has an interest in the outcome of this appeal. *Cf. United States v. Fischer*, 833 F.2d 647, 648 (7th Cir.1987) (prosecutor's appeal from district court's order granting defendant reimbursement of funds was moot once forfeiture of funds was established under plea agreement and plea agreement and order of forfeiture were not contested). Accordingly, the appeal is not moot.

4. If, however, a defendant timely moves to correct sentence pursuant to Fed.R.Crim.P. 35(c), that motion renders an otherwise final order nonfinal until the district court disposes of the motion. *United States v. Corey*, 999 F.2d 493, 494–96 & 496 n. 3 (10th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 374, 126 L.Ed.2d 473 (1993). Rule 35(c) permits the district court to correct a sentence imposed as a result of technical, arithmetic, or other clear error within seven days of the imposition of sentence. Here, defendant's request to amend the order of forfeiture was not made within the permissible time period and is therefore not a timely Rule 35(c) motion, *see Corey*, 999 F.2d at 494–96, and the requested modification of the forfeiture order was beyond the scope of Rule 35(c) relief.

5. Defendant also contends that Fed.R.Crim.P. 32(c)(3)(D) requires factual findings when a defendant alleges an inaccuracy in the presentence report. Because the district court did not rely on any alleged inaccuracies in the presentence report when it entered its order of forfeiture, after defendant stipulated to forfeiture within his guilty plea, we focus our analysis on Rule 11(f).

sidered this issue and have reached divergent conclusions.

[7] In *United States v. Roberts*, 749 F.2d 404, 409 (7th Cir.1984) (a RICO case), *cert. denied*, 470 U.S. 1058, 105 S.Ct. 1770, 84 L.Ed.2d 830 (1985),[6] the Seventh Circuit held that Rule 11(f) applies to forfeitures included as part of a plea agreement just as it applies to the guilty plea. "The mere fact that the defendant has agreed that an item is forfeitable, in a plea agreement, does not make it so; the trial court must ascertain whether it [is forfeitable]." *Id.* "A defendant's waiver of his right to trial cannot be said to have a factual basis, where a forfeiture of property is involved, unless the property is in fact subject to forfeiture." *Id.* at 410.

In *United States v. Reckmeyer*, 786 F.2d 1216 (4th Cir.), *cert. denied*, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986), the Fourth Circuit agreed with the reasoning in *Roberts* that a defendant's mere agreement to forfeit an item in the plea agreement does not make the item forfeitable. The court held that Rule 11(f) "requires the district court to inquire beyond the agreement to determine if there is a factual basis for the forfeiture of the assets." *Id.* at 1222. That court determined, however, that the record of the Rule 11 proceeding established a sufficient factual basis for the forfeiture.

The Fifth Circuit took a more lenient approach in *United States v. Bachynsky*, 949 F.2d 722, 730 (5th Cir.1991), *cert. denied*, —— U.S. ——, 113 S.Ct. 150, 121 L.Ed.2d 101 (1992), when it held "that the requirement of Rule 11(f) that the factual basis for a plea be established at the plea hearing does not apply to an order of forfeiture." It determined the district court's order of forfeiture would be upheld if the record provided a factual basis for forfeiture. *Id.* (citing *United States v. Crumbley*, 872 F.2d 975, 977 (11th Cir. 1989)). Although the court acknowledged the statement in *Reckmeyer* that a defendant's mere acquiescence in a plea agreement that an item is forfeitable does not make it so, it further recognized that the defendant's affirmative answers to questions at the plea hearing creates a substantial burden to overcome. Because the defendant in *Bachynsky* had never objected at sentencing to the forfeiture provisions of the plea agreement, nor provided evidence challenging whether the property was acquired or maintained by racketeering, the Fifth Circuit concluded that the defendant had not established an inadequate factual basis for the forfeiture.

The Eleventh Circuit rejected the analysis of *Reckmeyer* and *Roberts*. *United States v. Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992),[7] held "that a sentencing judge is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government." The court reasoned that because the forfeiture provision is "not a plea to a substantive charge, but a sanction to which the parties agree as a result of the defendant's plea," Rule 11(f) only applies to the guilty plea. *Id.* Because the defendant in *Boatner* agreed to forfeit property as a result of a bargained for exchange between the parties, the court affirmed the order of forfeiture.

[8] We agree with the holding and reasoning in *Boatner*. The parties both acknowledge that criminal forfeiture under § 853 is a part of the sentence, not a part of the substantive offense. The courts in *Roberts*, *Reckmeyer*, and *Bachynsky* fail to note this distinction. We question whether the Seventh Circuit would continue to apply the holding in *Roberts* in light of its more recent determinations that forfeiture is not an element of the offense but rather is punishment for an offense when a conviction has been

6. Cases applying the RICO forfeiture statute, 18 U.S.C. § 1963, may be used to construe § 853 due to the similarity of the two statutes. *United States v. Bissell*, 866 F.2d 1343, 1348 n. 3 (11th Cir.), *cert. denied*, 493 U.S. 849, 876, 110 S.Ct. 146, 213, 107 L.Ed.2d 104, 166 (1989).

7. The Eleventh Circuit previously had this forfeiture issue before it in *Crumbley*, 872 F.2d 975. In that case the court assumed, without deciding, that Rule 11(f) applied to the forfeiture portion of the plea agreement and determined that the rule is satisfied if the entire record provides a factual basis for the forfeiture. *Id.* at 976. *Boatner*, however, essentially overrules *Crumbley*. *See United States v. Herndon*, 982 F.2d 1411, 1417 (10th Cir.1992).

entered. *See United States v. Simone*, 931 F.2d 1186, 1199 (7th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991); *United States v. Herrera*, 893 F.2d 1512, 1541 (7th Cir.), *cert. denied*, 496 U.S. 927, 110 S.Ct. 2623, 110 L.Ed.2d 644 (1990).

[9] In addition, it is settled law that a lawful plea agreement is enforceable. *United States v. Khan*, 835 F.2d 749, 752 (10th Cir.1987), *cert. denied*, 487 U.S. 1222, 108 S.Ct. 2881, 101 L.Ed.2d 915 (1988). The government and a defendant and his attorney may arrive at a bargain "that a specific sentence is the appropriate disposition of the case." Fed.R.Crim.P. 11(e)(1)(C); *see United States v. Benchimol*, 471 U.S. 453, 455, 105 S.Ct. 2103, 2104–05, 85 L.Ed.2d 462 (1985). As long as the plea agreement is lawful, a defendant should be bound by its terms. *United States v. Alexander*, 869 F.2d 91, 94 (2d Cir.1989).

Defendant argues that the plea agreement and, therefore, his guilty plea, were not lawful and should not be enforced because he agreed to forfeit only the assets listed in the indictment or only property directly associated with the drug transactions. He contends that the plea agreement is ambiguous and vague and he would not have knowingly and voluntarily agreed to forfeit all of his property.

[10–12] The voluntariness of a guilty plea is a question of federal law subject to de novo review. *United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir.1990), *cert. denied*, 498 U.S. 1122, 111 S.Ct. 1079, 112 L.Ed.2d 1184 (1991). A guilty plea must be knowing and voluntary. *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); *United States v. Elias*, 937 F.2d 1514, 1517 (10th Cir.1991). A defendant's decision to plead guilty must be deliberate and intelligent and chosen from available alternatives. *Rhodes*, 913 F.2d at 843. "[T]o determine whether a plea is voluntary, a court must assess whether the defendant fully understood the consequences of the plea." *United States v. Williams*, 919 F.2d 1451, 1456 (10th Cir.1990), *cert. denied*, 499 U.S. 968, 111 S.Ct. 1604, 113 L.Ed.2d 667 (1991). The defendant's attorney "and the court have a duty to apprise the defendant of the consequences of the plea and ensure that it is voluntary." *Id.* Federal Rule of Criminal Procedure 11(c)(1) requires that a district court must, among other things, ensure the defendant understands the nature of the charge and the mandatory minimum and maximum penalties. *Elias*, 937 F.2d at 1517.

[13] In this case, the district court thoroughly assessed whether defendant understood the consequences of the guilty plea. The court informed him that all property described in the CCE count of the indictment could be forfeited. II R. 7. Defendant only questioned the extent to which the $1,500,000 limit on forfeiture applied to future legitimate earnings. His attorney and the district court agreed that the $1,500,000 limit applied only to products of drug transactions and not to legitimate future earnings. *Id.* at 3–9. Thereafter, defendant stated that he had signed, read, and understood the plea agreement, and that he had no questions about it. *Id.* at 19–20. He further stated that he understood the consequences of his plea, including that all of his property owned by reason of any drug transaction could be forfeited. *Id.* at 21. Defendant conceded that he was pleading guilty because of the trial testimony received thus far. *Id.* at 22.

Nothing in the record indicates defendant's plea would have been different if he had been questioned further about forfeitability of his assets. He intended to forfeit all of his property without requiring the government to prove the assets were forfeitable. The plea agreement requires forfeiture pursuant to § 853, which includes forfeitable assets under § 853(a) and substitute assets under § 853(p). *See also* 21 U.S.C. § 853(o) (§ 853 is to be liberally construed).

Further, defendant received a favorable plea agreement. In exchange for forfeiting all of his property, the government recommended the minimum sentence of twenty years imprisonment and agreed to drop all other counts in the indictment. One of those counts charged him with use of firearms with silencers in drug trafficking which mandates, upon conviction, a thirty-year sentence consecutive to the sentence on the underlying drug offense. Defendant entered into the

plea agreement after the government presented overwhelming evidence of his guilt. He now seeks the benefit of that bargain, but only to the extent it favors him. We will not require the government to undergo a fact-finding hearing and forego a substantial benefit of its bargain.

[14] We hold that defendant is bound by the terms of the plea agreement, *see Alexander*, 869 F.2d at 94, in which he unambiguously forfeited all of his property. The district court's extraneous statements that defendant was only forfeiting assets listed in the CCE count of the indictment or from his drug trade do not establish that defendant did not knowingly and voluntarily forfeit all of his property. Rather, defendant agreed to forfeit all of his assets, including some that on their face had no connection with his drug dealings—*e.g.*, "all bank accounts, investments, retirement accounts," I R. tab 210 at 3. Nothing in the agreement limits the forfeiture to those assets with an established factual basis for forfeiture. Defendant is also not limited to forfeiting only those assets directly related to the CCE conviction. Accordingly, the district court properly ordered on December 23, 1992, the forfeiture of all of defendant's assets[8] based on defendant's written agreement and knowing and voluntary ratification of that agreement at the change of plea hearing.

III

Defendant argues that he was not advised of and did not waive his right to a jury trial on forfeiture issues. Specifically, defendant contends he did not sign a written waiver of his right to a jury trial and there was no colloquy with the court during the plea or sentencing hearing regarding his right to or waiver of a trial on forfeitability of assets.

[15, 16] "The Sixth Amendment never has been thought to guarantee a right to a jury determination [on punishment]." *Spariano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984) (right to jury trial does not include right to jury determination whether to impose capital sentence). This suggests that defendant does not have a *constitutional* right to a jury trial at the forfeiture stage of these proceedings; the circuits, however, would apparently split on the issue of a constitutional right to a jury trial on forfeiture. *Compare United States v. Robinson*, 8 F.3d 418, 420 (7th Cir.1993) (noting in dicta that a defendant does not have a constitutional right to a jury determination on forfeiture issues, but acknowledging the right to such a determination under Fed.R.Crim.P. 31(e)) *with United States v. Garrett*, 727 F.2d 1003, 1012 & n. 6 (11th Cir.1984) (holding that a defendant has a constitutional right to a jury trial in a 21 U.S.C. § 848 proceeding to determine if an asset is forfeitable, after a jury trial as to guilt), *affirmed on other grounds*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). We need not decide that issue because constitutional rights can be waived, and because a defendant does have a *statutory* right, pursuant to Fed.R.Crim.P. 31(e),[9] to have a jury determine which of his assets may be forfeited. *Robinson*, 8 F.3d at 420. Thus, we must determine whether defendant waived his right to a jury trial. "[A] defendant's waiver of his statutory right to have a jury determine which portion of his property is subject to forfeiture is only valid if knowingly and voluntarily made." *Id.* at 421. A defendant has the burden of proving that he did not exercise a valid waiver of his right. *Id.* at 422.

[17, 18] A valid waiver of the right to a jury trial depends on unique facts of each case. *See id.* At the plea hearing, the district court advised defendant that he could

8. Of course, defendant could only agree to forfeit assets over which he had a power of disposition. Thus, if he had an interest in a profit sharing or pension plan established by his corporate employer that was inalienable by law, or if he was beneficiary of a valid spendthrift trust created by another person, these interests would be excluded from forfeiture in the same manner as assets in defendant's possession owned by a third party.

9. Rule 31(e) provides that "[i]f the indictment ... alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."

continue with the jury trial that had already started. The district court told defendant that if he pleaded guilty pursuant to the plea agreement, he would give up his right to a jury trial and would be sentenced. Defendant stated that he understood his rights and chose to plead guilty. *Cf. United States v. Jenkins*, 904 F.2d 549, 558–59 (10th Cir.) (at trial, defendant and his counsel have responsibility to make trial court aware of desire to testify regarding forfeiture; if no request is made, court and government can assume that evidence of guilt and forfeiture may be heard together), *cert. denied*, 498 U.S. 962, 111 S.Ct. 395, 112 L.Ed.2d 404 (1990). The district court did not specifically indicate that defendant's guilty plea negated a jury trial on any forfeiture issues. But there is no evidence at that hearing that defendant wanted a jury trial on the forfeiture issue, or thought he was going to have one. The plea agreement itself waived the right to a jury trial without specific mention of forfeiture. There is no evidence in the record that the government would have agreed to a plea agreement that settled only guilt and required a jury trial on the assets to be forfeited. We hold that specific reference to a jury trial on forfeiture issues was not necessary in light of the unambiguous plea agreement and defendant's knowing and voluntary plea. Under these circumstances we conclude defendant waived his right to a jury trial.

IV

[19] Defendant finally argues that even if all of his assets were correctly forfeited the forfeiture order violates the Excessive Fines Clause of the Eighth Amendment. The Supreme Court has determined that forfeiture may be analyzed under the Excessive Fines Clause. *Alexander v. United States*, — U.S. —, —, 113 S.Ct. 2766, 2776, 125 L.Ed.2d 441 (1993) (criminal forfeiture under 18 U.S.C. § 1963(a)); *see also United States v. Bieri*, 21 F.3d 819, 823 n. 2 (8th Cir.1994) (excessive fines analysis applies to criminal forfeiture under § 853(a)). The Court, however, has not established a test to determine when a forfeiture is excessive. *Alexander*, — U.S. at —, 113 S.Ct. at 2776; *Austin v. United States*, — U.S. —, —, 113 S.Ct. 2801, 2812, 125 L.Ed.2d 488 (1993). Rather, courts must consider all factors when evaluating whether a forfeiture is unconstitutionally excessive. *Bieri*, 21 F.3d at 824 (citing *Alexander*, — U.S. at —, 113 S.Ct. at 2776).

[20] We need not decide when a forfeiture might violate the Excessive Fines Clause, because the forfeiture in this case was not excessive. *See United States v. Certain Real Property & Premises Known as 38 Whalers Cove Drive, Babylon, NY*, 954 F.2d 29, 39 (2d Cir.) (civil forfeiture), *cert. denied*, — U.S. —, 113 S.Ct. 55, 121 L.Ed.2d 24 (1992). A fine of up to $2,000,000 and forfeiture are permitted for a CCE offense. 21 U.S.C. § 848(a); U.S.S.G. § 5E1.2(c)(3), (4). Defendant was fined only $5,000. The plea agreement stated that property up to $1,500,000 could be forfeited; yet the actual value of the property forfeited was only $410,000. The forfeiture order did not violate the Excessive Fines Clause of the Eighth Amendment.

V

Defendant raises several other arguments in his pro se briefs, mostly related to the issues determined above. These arguments are not sufficiently meritorious to warrant their being specifically addressed.

The order of forfeiture is AFFIRMED. The government's motion to dismiss is DENIED. Defendant's motion for limited remand is DENIED as moot.

KEY NUMBER SYSTEM

UNITED STATES of America,
Plaintiff-Appellee,
v.
Martha LIRA-ARREDONDO,
Isaac Guzman-Hernandez,
Defendants-Appellants.
Nos. 94-1006, 94-1007.

United States Court of Appeals,
Tenth Circuit.

Oct. 25, 1994.

Two defendants were convicted in the United States District Court for the District